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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1767~~ 70-224

E. H. HOLCOMB, JR.,
Petitioner,

vs.

CESSNA AIRCRAFT COMPANY, and
CONTINENTAL MOTORS CORPORATION,
Respondents.

BRIEF OF RESPONDENT, CONTINENTAL MOTORS CORPORATION, ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

In this brief, Petitioner, E. H. Holcomb, Jr., who was plaintiff in the District Court in the Middle District of Florida and appellee in the Fifth Circuit Court of Appeals, will be referred to as Petitioner. Respondent, Continental Motors, who was a co-defendant in the District Court in the Middle District of Florida and appellant in the Fifth Circuit Court of Appeal, will be referred to as Continental. Respondent Cessna Aircraft Company, who was a co-defendant in the District Court

in the Middle District of Florida and appellant in the Fifth Circuit Court of Appeals, will be referred to as Cessna. The following symbols will be used:

O — Opinion of the Fifth Circuit Court of Appeal.

B — Brief of Petitioner, E. H. Holcomb, Jr.

The *sole* question here is:

WHETHER THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEAL CONFLICTS WITH THE DECISIONS FROM OTHER CIRCUIT COURTS OF APPEAL OR DECISIONS FROM THE SUPREME COURT OF THE UNITED STATES.

Petitioner's second point[1] is obviously included in what actually amounts to the sole question on certiorari here and cannot in and of itself formulate a basis for granting certiorari.

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[1] Petitioner's second point states:

"2. Whether the Court of Appeals for the Fifth Circuit properly apply the "scintilla of evidence" rule in reversing the judgment and jury verdict with directions to the lower court to dismiss the Complaint with prejudice to the plaintiff?" (B 2)

STATEMENT OF THE CASE

Continental cannot agree with petitioner's statement of the case. He alludes to the controlling point that "the testimony and evidence educed at the trial is outlined in the opinion of the Court of Appeals"[2] and then injects alleged facts which are not in the Circuit Court's opinion. Other facts are simply misconstrued.

In order to separate fact from fiction, it is important to bring to this Court's attention the focal point of this case. Continental shall later examine in detail petitioner's statement of the case.

The case against Continental dealt exclusively with breach of implied warranty of the engines of petitioner's Cessna 310K. Continental makes engines for Cessna. None of the other alleged defects on the Cessna 310K were attributable to Continental. *The law clearly required petitioner to prove a manufacturer's defect in the engines at the time of sale.* In other words, the petitioner had to prove what the manufacturer's defect was and when it developed. This is the key to the entire case.

The Circuit Court's opinion emphasizes in italics that after examining the record, no witnesses testified that there was a manufacturer's defect.[3] The Court in its opinion said:

> "All witnesses, except James Matthews, the regular pilot for the 310K, testified that this was due to overheating the engines. *No one testified that there was a manufacturing defect.* The most common ways to incur overheating damage are by leaning the fuel improperly or by failure to maintain

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[2] (B 4)
[3] (O 8)

proper flight attitude. Either instance is due to pilot error." (0 8)

This finding by the Court illustrates one of the fundamental weaknesses in petitioner's position here. Petitioner asks this Court to accept the findings of the Circuit Court but then seeks to refute them without bringing the entire testimony of all the witnesses before this Court. Petitioner has failed to place the entire record before the Court on certiorari. Not only is such a procedure patently unfair to the Circuit Court and respondents, but it is fatal to the granting of petitioner's petition for certiorari.

This case began when Holcomb had his second FAA inspection. One of the pistons on the No. 4 cylinder showed a 3/1000 variation in one of the piston grooves due to wear. Otherwise, the plane was in perfect condition. It was certified as airworthy by the FAA after the No. 4 piston, whose cost is $80.00, was replaced. To claim loss of an entire airplane because of this type of mechanical problem is ludicrous. It is like a spark plug going bad in one engine after ten thousand miles of travel. The Circuit Court of Appeal agreed with this position:

"There was no trouble with the engines until the second 100 hour check. One hundred hour checks are required by the F.A.A. [for every 100 hours of flying time]. The checks consist of stripping the airplane almost completely down. If everything checks out, the plane is declared airworthy and this information is registered in the engine logbook. The Cessna 310K had its first inspection at the expiration of 80 hours elapsed flying time and was declared airworthy.

"The second 100 hour check was begun in November, 1966, at Tropical Aviation, Inc., of Clearwater, Florida. The tachometer showed 182 hours. The engine compression in all cylinders was found to be

low. The number 4 cylinder on each engine registered 35 pounds. Compression is pounds per square inch on the piston, and it is checked by removing the sparkplug, inserting an airhose, and injecting either eighty or a hundred pounds of air into the cylinder. When this is done a gauge measures the amount of leakage in the cylinder. If the leakage is in excess of 25%, the F.A.A. regulations state that the internal condition of the cylinder should be checked. However, the F.A.A. has no mandatory standard for engine compression and only sets the 25% figure as an advisory. The plane cannot be grounded for low compression. Since the number 4 cylinder of each engine of the 310K showed a compression reading of 35 pounds, these cylinders were pulled. Upon inspection, a discoloration was found on the cylinder wall, and there was a buildup of carbon on the valves. All witnesses, except James Matthews, the regular pilot for the 310K, testified that this was due to overheating the engines. *No one testified that there was a manufacturing defect.* The most common ways to incur overheating damage are by leaning the fuel improperly or by failure to maintain proper flight attitude. Either instance is due to pilot error." (See Footnote 4) (O 7)

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[4] Footnote 2 of the opinion of the Circuit Court of Appeals stated:
[2]After Mr. Holcomb traded the 310K, it was subjected to the following inspections, with the results indicated:

February 23, 1967.	206.8 hours, compression good.
May 8, 1967.	314 hours, compression average.
June 17, 1967.	398 hours, compression normal.
November 17, 1967.	591 hours, overhauled, cylinders and pistons, inspected for ring size according to manufacturer's specifications. Excessive ring, piston and piston groove wear. Cylinders reconditioned and reinstalled. Some pistons replaced. All rings replaced. Inspector was of the opinion that the wear was caused by leaning. Inspector found no manufacturer's defects in the cylinders or pistons.
February 16, 1968.	692 hours, airworthy.
June 11, 1968.	825 hours, airworthy.
September, 1968.	1000 hours [180,000 land miles] new engines installed. (O 7)

* * * * *

"All testimony concerning the cylinders except that of Matthews, attributed the overheating problem to improper leaning." (0 8)

* * * * *

"On January 16, 1967, Robert Paquin, regional service manager for Continental for twenty-eight years, inspected the cylinder and piston of Holcomb's 310K. He found an overheated condition, resulting in discoloration and excess carbon. Inspection of the piston showed a clearance of 11/1000 of an inch, 3/1000 in excess of that to be preferred." (0 9)

* * * * *

"Holcomb requested that Paquin replace the engines, but Paquin told him that Continental would only give him a new piston and a set of rings. Even though this was unsatisfactory to Holcomb, he had the number 4 cylinder in the left engine reinstalled with a new piston and new rings, which resulted in a cost to him of $119.42 for parts and $186.90 for labor. The plane was then flown for an hour *and all the gauges registered normal.* The plane, therefore, was declared airworthy. At different times (up to 500 hours) after the installation of the new piston the engines were inspected, and were always found to be satisfactory. No one present at the disassembly of the plane ever testified that there was a manufacturer's defect. Almost all stated, however, that there was an overheated condition which would be due to pilot error." (0 9-10)

* * * * *

"We are here dealing with engines which revealed no defect upon inspection after operating for 80 hours [about 14,000 air miles]. No difficulty appeared until the second check, 182 hours [over

30,000 miles]. Low engine compression was the problem, caused by an overage of 3/1000 of an inch in the preferred clearance between the walls of one of the piston ring grooves. The number 4 cylinder was reinstalled and a new piston and set of rings were placed in the left engine. The plane was then flown for an hour, all gauges normel, no oil leaks and then pronounced airworthy by an F.A.A. mechanic. Subsequent checks to 591 hours revealed normal or average compression and no lack of airworthiness. At 591 hours, the cylinders were reconditioned and reinstalled. Some pistons and all rings were replaced. The plane then flew another four hundred hours before the new engines were installed. No F.A.A. inspector (for 1,000 flying hours) noted a manufacturer's defect in the engine" (0 12-13)

* * * * *

"In view of the condition of the engines at the 80 hour check and the performance of the engines both before and after the 182 hour check, in view of the uniform failure of all the experts to detect a manufacturer's flaw in the engines at any time during 1,000 hours or 180,000 land miles of operation, in view of the failure of Pilot Matthews to give any explanation or reason for ascribing the condition to a manufacturer's defect, and in view of his ultimate concession that the extra tolerance was probably due to wear, we are inescapably driven to the unavoidable conclusion that as to the engines the evidence for the plaintiff simply failed to raise an issue for submission to a jury on the question of implied liability.

"It necessarily follows that the motion for directed verdict on behalf of Continental Motors should have been sustained." (0 15-16)

The statements of petitioner do not correspond with the statement of facts and findings of the Circuit Court of Appeal. Here is a list of such inconsistencies:

1. There was no evidence that something was wrong with the engine after 182 hours since the compression was low.[5] Compression checks are not reliable and may or may not indicate engine problems. It is not determinative of a manufacturer's defect. The Circuit Court's findings support Continental's statement in this regard:

> "If the leakage is in excess of 25%, the F.A.A. regulations state that the internal condition of the cylinder should be checked. However, the F.A.A. has no mandatory standard for engine compression and only sets the 25% figure as an advisory. The plane cannot be grounded for low compression." (O 8)

(a) The plane was found to be in perfect condition after the 182 hour F.A.A. check.[6]

(b) Thereafter, the compression of the airplane remained within normal limits for 180,000 land miles.[7]

2. The issue on appeal was whether there was any evidence of a manufacturer's defect with the burden upon petitioner to show what the defect was and when

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[5] Petitioner's Brief states:
"As can be seen from that detailed statement of the facts, the evidence was without contradiction that something was wrong with the engines at the time they were checked after only 182 hours of use since at that time, the compression in all cylinders was found to be low." (B 4)

[6] "This plane was then flown for one hour, all gauges normal, no oil leaks, and then pronounced airworthy by an F.A.A. mechanic." (Circuit Court's opinion at 12-13)

[7] See Footnote 2 of opinion of the Circuit Court of Appeals. (O 7)

it occurred. This is contrary to the meaning and intent of a portion of petitioner's statement of the case.[8]

3. The following statement made by petitioner in his brief is *not* supported by the Circuit Court's opinion or the record. No one stated that the problem complained of *could* be due to defects in design or manufacture.

> "Cessna's and Continental's evidence indicated that the defect developed as a result of overheating the engines caused by leaning the fuel improperly or by failure to maintain proper flight altitude. This evidence was based upon the opinions of certain experts and mechanics employed by Cessna and Continental. These experts admitted that the problem in the engines could be caused by only one of two things: either a defect in the design or manufacture of the engines, or in pilot error as described above." (B 4-5)

4. Holcomb's statement concerning talking to a Cessna representative who admitted Continental had problems with its engines is not supported by the record.[9] The opposition well knows that this testimony was held inadmissible as heresay against Continental

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[8] Petitioner's Brief states:
"The issue submitted to the jury was whether the defect in the engine was caused by pilot error as Continental's and Cessna's evidence tended to show, or as a result of some manufacturing defect as Holcomb's evidence tended to show." (B 4)

[9] Petitioner's Brief states:
"In addition, Mr. Holcomb testified that he had talked with a Cessna representative who admitted that the company had experienced problems that they had not been able to correct in these Continental engines. Moreover, there was testimony that the same engines as those in the 310 K were having overheating problems and that numerous engines had been burned up in airplanes owned by the military at Ft. Rucker, Alabama. Of course, Continental's representative explained this by testifying that the military people improperly subjected these engines to stresses for which they were not designed." (B 5)

at trial. The opposition also knows that the planes involved were military aircraft and did not have the same engines. On this question the Court of Appeal's opinion stated:

> "There was certain testimony from Robert Paquin that engines similar to those on the 310K were having overheating problems, and numerous engines had been burned up. These engines were on planes owned by the military at Fort Rucker. However, there was testimony that these engines were subjected to strenuous military aircraft training procedures for which they were not designed. Also, they were on Beech Barons, not 310Ks." (O 10)
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> * * * * *
>
> "A different decision is not warranted by proof that there was difficulty in similar engines in other aircraft used for rigorous military training. As to that item the undisputed proof showed that in this type of operation the engines were put through full power stalls, slow speed plays, and the planes had been winterized as for operations at 55 or 60 degrees below zero. The undisputed proof further showed that upon correction of these procedures the engines lasted for a phenomenal length of time."

5. There was *no* "circumstantial evidence" which overwhelmingly demonstrated that there was a manufacturer's defect. There was no problem at all. The plane was declared airworthy time and time again by the F.A.A. The statement of petitioner in this regard must be totally rejected.[10] Again, no expert of Cessna or Continental ever inferred that the engine was improperly designed or manufactured.

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[10] Petitioner's Brief states:

> "Therefore, not only did James Mathews testify that the defect 'would revert back to the manufacturer', but the circumstantial evidence overwhelmingly demonstrated that the defect did not develop as a result of pilot error and on the basis of Cessna's and Continental's own experts' testimony, would therefore of necessity have been caused by improper design or manufacture by Continental." (B 5)

ARGUMENT

WHETHER THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEAL CONFLICTS WITH THE DECISIONS FROM OTHER CIRCUIT COURTS OF APPEAL OR DECISIONS FROM THE SUPREME COURT OF THE UNITED STATES.

The sole question here is whether the decision under review conflicts with the cases cited by petitioner. It is obvious that it does not. It is equally as obvious that the Circuit Court of Appeal fairly and adequately examined the record to determine if there was *any evidence* of a manufacturer's defect. There was none.

The purpose of 28 U.S.C.A. Sec 1254(1), which gives the Supreme Court jurisdiction in conflict cases, is to secure uniformity of decisions and bring cases of importance which are in the public interest before the highest court of last resort in the country.[11] The decision under review does not disturb the uniformity of decisions. Frankly, it is not one of great importance except to the litigants themselves. This Court in *Fields vs. United States,* 205 U.S. 292, 27 S.Ct. 543, 51 L.ed. 807, said:

> "* * * In this case there is no sufficient ground for certiorari. The application comes within none of the conditions therefor declared in the decisions of this Court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and federal courts or between those of federal courts of differ-

[11] *Ruhlin vs. New York Life Ins. Co.,* 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860; *Magnum Import Co. vs. Coty,* 262 U.S. 159, 67 L.Ed. 922, 43 S.Ct. 531.

ent circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

In order to find conflict, the case at bar must conflict with another decision whose *facts and issues* are essentially similar.[12] No such cases are presented in petitioner's brief. The facts of the cases claimed to be in confict are not even discussed by petitioner in his brief.

Petitioner claims that the Circuit Court of Appeal "determined the weight and credibility" of the witnesses[13] and failed to accord petitioner all reasonable inferences to be drawn from the evidence.[14] Petitioner thus calls upon this Court to review the evidence of the case. The Supreme Court has repeatedly refused to grant certiorari to review the evidence or inferences drawn from it.[15] In *National Labor Relations Board vs. Pittsburgh,* 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453:

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[12] *General Am. Investers Co. vs. C. I. R.,* 348 U.S. 434, 99 L.Ed. 504, 75 S.Ct. 478; *Lewyt Corp. vs. C. I. R.,* 349 U.S. 237, 99 L.Ed. 1029, 75 S.Ct. 736.

[13] (B 7)

[14] (B 8)

[15] In *General Talking Pictures Corporation v. Western Electric Company,* 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849, it is stated: "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co. 263 U.S. 508, 68 L.Ed. 413, 44 S. Ct. 164; United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925, 926, 45 S. Ct. 496."

See also *J. I. Case Company v. Borak,* 377 U.S. 426, 12 L.Ed.2d 423, 84 S. Ct. 1555; *Kelley vs. Everglades Drainage District* 319 U.S. 415, 87 L.Ed. 1485, 63 S. Ct. 1141; *United States of America vs. Johnston,* 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496.

"Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is *a real and embarrassing conflict of opinion* and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. *It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated.*

"In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co. 274 US 543, 544, 71 L ed 1193, 1194, 47 S Ct 663.

"Affirmed." (Emphasis supplied)

Further, in *Federal Trade Commission vs. Standard Oil Company,* 355 U.S. 396, 2 L.ed. 359, 78 S.Ct. 369:

"The Court of Appeals found no basis in the record for such a finding and vacated the order of the Commission, holding that Standard's '"good

> faith" defense was firmly established.' 233 F2d 649, 655. In view of our former opinion and the importance of bringing an end to this protracted litigation, we granted certiorari. 352 US 950, 1 L ed 2d 242, 77 S Ct 325 (1956). *Having concluded that the case turns on a factual issue, decided by the Court of Appeals upon a fair assessment of the record, we affirm the decision below."* (Emphasis supplied)

In the first case cited by petitioner,[16] *Standard Oil Company of California vs. Perkins* (9th Cir. 1965) 347 F.2d 379, Standard Oil appealed a judgment as the result of a verdict finding that Standard Oil has contracted with Perkins to sell Standard's products on a "non-exclusive basis" in the Yakima, Washington, area. The Ninth Circuit Court of Appeals carefully reviewed the evidence as did the Circuit Court in the case at bar. Standard claimed that the jury could not have found that the "Yakima area" was intended as part of Perkins' territory. The Circuit Court of Appeals found against Standard's position stating:

> "And here, the map appended to and made a part of the contract was convincing physical evidence from which the jury could rationally conclude that the Yakima area was indeed a territory alloted to the consignees. The jury was neither required to nor apparently did it believe Standard's assertion that the Yakima area had been included as part of the consignees' territory by mistake."

What the *Standard* case, supra, has to do with the case sub judice is not discernable. It does not parallel the issues and findings in the decision under review. The same observation is true in regard to *Lavender vs. Kurn,* 327 U.S. 645, 90 L.ed. 916, 66 S.Ct. 740[17] which in-

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[16] (B 7)

[17] Cited by Petitioner. (B 7)

volved a wrongful death suit under the Federal Employees Liability Act for the death of a switch-tender.

In the next case cited, *Continental Airlines, Inc. vs. Wagner-Morehouse, Inc.* (7th Cir. 1968) 401 F.2d 23[18], damages were sought by Wagner due to the alleged failure of loading tubes, which were used to transport people from a terminal to an airplane. The Seventh Circuit examined the testimony, again as did the Circuit Court of Appeals in the case at bar, and found that there was substantial evidence in favor of Wagner to preclude entry of judgment N.O.V. No sufficient conflict can be generated from this case.

Smith vs. J. C. Penney Company (7th Cir. 1958) 261 F.2d 218[19], cited by petitioner, fully supports Continental's position. Smith brought suit for personal injuries when she fell on a strip of ice allegedly caused by freezing water dripping from the edge of defendant's building. A jury returned a verdict for Smith. The Seventh Circuit held that the evidence was insufficient to take to the jury:

> "Appellee failed to prove actionable negligence on the part of appellant in this case. As indicated, there is no evidence that the ice accumulated as a result of a defect in the structure or that appellant built or maintained a structure which caused an undue accumulation of ice, or failed to take any reasonable action to prevent or remove such an accumulation of ice. In light of all this, we hold that the evidence fails, as a matter of law, to support a finding of negligence on the part of appellant and that the trial court erred in denying appellant's motions for a directed verdict or for judgment notwithstanding the verdict."

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[18] (B 7)

[19] (B 9)

As in the *Smith* case, supra, the Fifth Circuit held that the evidence failed to support petitioner's claim of a manufacturer's defect as a matter of law. There was no weighing of the evidence or determining the credibility of witnesses. There was a simple finding that petitioner had produced no probative evidence at all on the question of a manufacturer's defect at the time of sale. To this day, petitioner cannot tell us what the manufacturer's defect allegedly was. This fact is admitted in petitioner's brief filed before this Court.[20] If petitioner cannot identify it, then certainly it was not up to the Circuit Court of Appeals to speculate what the defect was for him.

Petitioner claims that Holcomb's testimony concerning the problems of military aircraft at Fort Rucker and Pilot Matthews' testimony would have to be disregarded in order for the Circuit Court of Appeals to arrive at its decision. Holcomb's testimony is not in the Circuit Court's opinion and was excluded at trial against Continental as hearsay. Matthews' testimony is carefully analyzed by the Circuit Court and clearly shows that he never stated that there was a manufacturer's defect. A manufacturer is not liable for breach of implied warranty for existing conditions caused by wear and tear.[21]

Petitioner had to prove that a specific defect existed in the engines at the time of sale. He wholly failed to meet this burden.

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[20] (B 9)

[21] *Marker v. Universal Oil Products Company* (10th Cir. 1957) 250 F.2d 603; *Mitchell v. Machinery Center, Inc.* (10th Cir. 1962) 297 F.2d 883.

The Circuit Court of Appeals relied upon *United States Rubber Company vs. Bauer* (8th Cir. 1963) 319 F.2d 463, a case written by Mr. Justice Blackmun.[22] Here Bauer was injured when the drive belt on his combine broke and struck him on the head. He claimed the belt broke as the result of a manufacturer's defect. The district judge, sitting as trier of the fact, held that there was a breach of implied warranty of fitness for use and found for Bauer. In reversing judgment, Mr. Justice Blackmun stated:

> "A verdict may not rest on guess or speculation."
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> * * * * *
>
> "In a products liability case it is not necessary that the product be perfect or accident proof. It need only be reasonably fit for the use for which it was intended."
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> * * * * *

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22 "It is not to be doubted that Holcomb had the burden of proving the existence of a defect in the engines on the date of sale, i.e., May 18, 1966. See *United States Rubber Company v. Bauer*, 8 Cir., 1963, 319 F.2d 463, 466 [a case remarkably like this one, although it involved a broken, one year old, belt on a combine, opinion by J. Blackmun]. Of course, the existence of such a defect may be shown by circumstantial evidence, but the verdict may not rest on guess or speculation, *United States Rubber Company v. Bauer, supra.*" (O 12)

* * * * * * * * * *

"In diversity cases, evidence, in order to warrant submission to a jury, must present something more than a theory which will permit speculation and it must be something more than a mere scintilla, *Firemen's Insurance Company of Newark, New Jersey v. Robbins Coal Company*, 5 Cir., 1961, 288 F.2d 349, cert denied 368 U.S. 875. See, also, *Schrader v. Prudential Insurance Company*, 5 Cir., 1960, 280 F.2d 355; *Hogan v. United States*, 5 Cir. 1963, 325 F.2d 276; *Herron v. Maryland Casualty Company*, 5 Cir., 1965, 347 F.2d 357; *Geddes v. Daughters of Charity of St. Vincent DePaul, Inc.*, 5 Cir., 1965, 348 F.2d 144; *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 5 Cir., 1968, 403 F.2d 541; *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365." (O 16)

"In the absence of proof of the existence of a defect a defendant may not be held liable for negligence in manufacture."

* * * * *

"Similarly, in the absence of such proof, a defendant may not be held responsible on the theory of implied warranty."

* * * * *

"The plaintiff offered no evidence as to what caused this belt to break.

"If we lay to one side the testimony of Mr. Adams and of the other witnesses called by the defendant, the plaintiff's evidence, viewed in the light most favorable to him as the prevailing party below and with the benefit of all inferences reasonably to be drawn therefrom, Ford Motor Co. v. Mondragon, supra, pp. 345-346 of 271 F.2d, and including the material admitted over objection, does not, we conclude, apart from the possible application of res ipsa loquitor, establish a case for the plaintiff on either a theory of negligence or of products liability. The plaintiff's case proves or tends to prove only the following and nothing more: The belt originally on the combine did not break but stretched until it was of no further use; the defendant manufactured the replacement belt; it broke rather suddenly after some use under not unusual conditions; when it broke it occasioned Bauer's injuries; when Teske installed the third belt he concluded that the pulleys were properly aligned and made no adjustments in the mechanism; this third belt, too, broke after moderate use; after Bauer's accident the defendant recalled belts of this particular type from the market; its South St. Paul wholesaler advised its own customers that there had been failures in the belt and that changes were being made to strengthen it; there had been breakage in the TXS-67; specifically, 40 belts of the defendant's manufacture broke in the period from 1958 to 1960; and the belt was redesigned in 1960.

"But the plaintiff's evidence also discloses that combine drive belts do wear out and break and that suppliers do stock replacement belts. That the defendant, after consultation with its South St. Paul wholesaler and the latter's retail customers, called in belts of that type is not necessarily a concession of defect in manufacture. Its doing so is just as consistent with a genuine concern on the defendant's part that any injury had resulted with one of its belts, with a cautious desire to ascertain if there was a defect, and with a willingness to cooperate fully with its established customers. We are left with no proof or reasonable inference as to why this belt broke at this time."

* * * * *

"We are driven to conclude, therefore, that the trial court's finding that the belt was defective was clearly erroneous within the meaning of Rule 52(a), or on the entire evidence we are 'left with the definite and firm conviction that a mistake has been committed', United States v. United States Gypsum Co., 1948, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746, and that the finding is 'contrary to the clear weight of all the evidence', Kauk v. Anderson, 8 Cir. 1943, 137 F.2d 331, 333."

Consider petitioner's counsel's remarks made at trial during final argument in light of the *United States Rubber Company* case, supra:

"Now, there is just this last point, this question of proving the specific defect. Of course, we couldn't prove the specific defect. There is no way for someone in the position of Mr. Holcomb, Mr. Matthews, or even these repairmen —— they are not metallurgists, they are not experts in telling what is right or wrong with particular metals or materials. They are not engineering designers. I am not, those mechanics aren't.

> "There is something wrong. We have not pointed out specifically — of course, we haven't — what it is in that particular engine that causes its difficulties. But there is something wrong, and I think that you will find that there are some inherent defects in those engines that have caused not only Mr. Holcomb's problems but the other problems that Mr. McCormick told him about, and I think that, contributed to the problems at Fort Rucker.
>
> "And as a result, I would submit to you that those defects were in that engine, along with the other defects in the plane, at the time that plane was purchased by Mr. Holcomb."

The key to this entire case is the Circuit Court's finding:

> "All witnesses, except James Matthews, the regular pilot for the 310K, testified that this was due to overheating the engines. *No one testified that there was a manufacturing defect.* The most common ways to incur overheating damage are by leaning the fuel improperly or by failure to maintain proper flight attitude. Either instance is due to pilot error." (0 8)

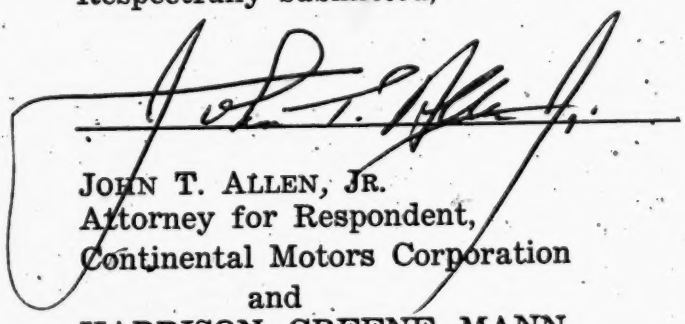
It is obvious that there is no conflict and certiorari should be DENIED.

CONCLUSION

Petitioner seeks a second review of the evidence in this case by claiming conflict with certain decisions which are not factually similar to the case sub judice. This Court has refused to review evidence in similar cases on a number of occasions.

The claim that the Circuit Court of Appeals weighed the evidence, determined the credibility of witnesses and failed to accord petitioner all reasonable inferences from the evidence is shown to be without merit by a fair reading of the facts and findings of the Circuit Court of Appeals as set forth in that Court's opinion. The Circuit Court of Appeals found that petitioner had failed to offer a scintilla of evidence of a manufacturer's defect at the time of sale. The Circuit Court of Appeals further found that the case was controlled by *United States Rubber Company vs. Bauer,* supra. No conflict having been shown, certiorari should be DENIED.

Respectfully submitted,



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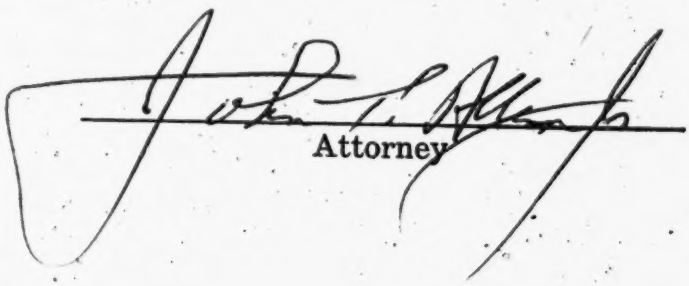
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June, 1971, two copies of the foregoing Brief of Respondent, Continental Motors Corporation, on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were furnished by mail to John I. Van Voris, Esquire, of Shackleford, Farrior, Stallings & Evans, Professional Association, Post Office Box 3324, Tampa, Florida 33601, Attorneys for Petitioner, E. H. Holcomb, Jr.; and to Richard M. Metzel, Esquire, of Fowler, White, Gillen, Humkey, Kinney & Boggs, P. A., Post Office Box 1438, Tampa, Florida 33601, Attorneys for Respondent, Cessna Aircraft Company.



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